### INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MICHAEL A. MONTEZ,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

represented himself.

Respondent.

Hearing was held before Administrative Law Judge Robert W. Thompson, Jr. on July 11, 2000. Respondent was represented by Joseph Q. Lynch, Assistant Attorney General. Complainant

Respondent's sole witness was William C. Fitzgerald, Deputy Director for the Division of Adult Parole Supervision, Department

of Corrections. Complainant did not testify.

Admitted into evidence by stipulation of the parties were Respondent's Exhibits 1 through 13 and Complainant's Exhibit A.

## MATTER APPEALED

Complainant appeals a disciplinary six-month reduction in pay. For the reasons set forth herein, respondent's action is <u>affirmed</u>.

#### **ISSUES**

- Whether respondent's action was arbitrary, capricious or contrary to rule or law;
- 2. Whether the discipline imposed was within the range of available alternatives.

#### PRELIMINARY MATTERS

Respondent withdrew its request for an award of attorney fees and costs.

### STIPULATIONS OF FACT

- 1. Mr. Montez pled guilty to DWAI (Driving While Ability Impaired) in Adams County on April 28, 2000.
- 2. Mr. Montez was sentenced on April 28, 2000, and his sentence was: 30 days in jail (suspended), one year of probation, 24 hours of community service, Level I Alcohol Education, a \$500 fine (suspended) and \$399 in court costs.
- 3. Mr. Montez's driving privileges were suspended for 90 days and have been reinstated. The suspension was from March 14 until June 14, 2000.

## FINDINGS OF FACT

- 1. Complainant, Michael Montez, a Parole Officer with the Department of Corrections Division of Adult Parole, was stopped by a police officer and charged with driving under the influence on or about January 30, 2000, while driving his personal vehicle.
- 2. Director of Parole Thomas Coogan informed Deputy Director William Fitzgerald of the incident involving Montez and delegated to Fitzgerald the appointing authority to conduct a predisciplinary meeting and determine if corrective or disciplinary action was warranted. (Ex. 10.) Fitzgerald has been with the Department of Corrections since 1974.
- 3. The R-6-10 meeting was held on March 24, 2000. Fitzgerald agreed to defer his decision until after the disposition of the criminal case stemming from the incident.
- 4. On May 1, Montez telephoned Fitzgerald and stated that he had been convicted of DWAI and was sentenced immediately to a 30-day suspended jail sentence, a \$500 suspended fine, one year of probation, 24 hours of community service, Level I Alcohol Education and court costs. His driver's license was suspended for 90 days. Fitzgerald asked Montez to fax the information to him, which he did.
- 5. Fitzgerald determined that Montez violated Department of Corrections Administrative Regulation (AR)1450-01, "Staff Code of Conduct," IV. N and ZZ.
- 6. AR 1450-01 4. N. provides: "Any action on or off duty on the

part of DOC staff that jeopardizes the integrity or security of the Department, calls into question the staff's ability to perform effectively and efficiently in his or her position, or casts doubt upon the integrity of the staff is prohibited. Staff will exercise good judgment and sound discretion." (Ex. 3.)

- 7. AR 1450-01 IV. ZZ provides: "Any act or conduct on or off duty, which affects job performance and which tends to bring the DOC into disrepute or reflects discredit upon the individual as a correctional staff, is expressly prohibited as conduct unbecoming, and may lead to corrective and/or disciplinary action." (Ex. 3.)
- 8. It is an absolute requirement of the job that a parole officer maintain his driver's license. It is essential that a parole officer drive a vehicle in the performance of his duties.
- 9. Parole officers are assigned state vehicles.
- 10. Parole officers visit the homes of parolees, make employer contacts, contact resource agencies, and appear at court hearings and Parole Board meetings.
- 11. Fitzgerald concluded that Montez's conduct of being convicted and sentenced for a drunk driving offense was so serious as to warrant immediate disciplinary action in order to communicate the seriousness of the incident to the employee and send a message to other parole officers. He was strongly influenced by the fact that the loss of driving privileges interfered with the performance of job responsibilities and other officers would have to transport Montez to places where he needed to be outside the office. He

believed that Montez demonstrated very poor judgment for a parole officer, that good judgment is a requirement of the position, and that such conduct discredited the entire Department. Fitzgerald also determined that such conduct might interfere with the relationship a parole officer has with his clients, if they ever found out. Counseling parolees is part of the job and parole officers must be credible and maintain integrity. Such conduct might also have an adverse effect on the parole officer's relationship with other law enforcement agencies. Fitzgerald did not feel that the sanctions imposed by a court of law were a substitute for disciplinary action. To him, they were separate issues. His only concern was how the employee's actions effected the job and other employees.

- 12. Fitzgerald took into account that Montez was a good parole officer and had served the Department well in the past.
- 13. By letter dated May 19, 2000, the appointing authority imposed the disciplinary action of a six-month, ten percent reduction in pay. (Ex. 2.) Complainant Michael Montez filed a timely appeal, alleging that the discipline was excessive.

## DISCUSSION

In this de novo disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The Board may reverse respondent's decision only if the action is found arbitrary,

capricious or contrary to rule or law. § 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeak v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996).

An administrative agency abuses its discretion when the decision under review is not reasonably supported by any competent evidence in the record. Van Sickle v. Boyes, 797 P.2d 1267 (Colo. 1990). No competent evidence means that the agency's ultimate decision is so devoid of evidentiary support that the only explanation must be that the agency's action was an arbitrary and capricious exercise of authority. Board of County Commissioners v. O'Dell, 920 P.2d 48 (Colo. 1996).

Complainant concedes that he violated AR 1450-01 and does not dispute that some discipline was warranted in addition to the sanctions imposed in the criminal case. He argues, however, that the discipline imposed was too harsh for the circumstances, pointing out that he has been a good employee and has always maintained integrity and honesty. He asserts that his ability to counsel parolees has been enhanced by his completion of Level I Alcohol Education because he gained a better understanding of how to counsel parolees. Additionally, he does not believe he was that much of a burden to his co-workers by not being able to drive.

Although the sanction imposed by this appointing authority might be considered excessive by another appointing authority, there is no

evidence of record that the appointing authority abused his discretion in arriving at the penalty he chose. He thoughtfully considered all aspects of the situation and the needs and best interests of the agency, relying upon his expertise. There is no record support for a finding that the discipline was excessive as a matter of law. The evidence presented sustains the conclusions of the appointing authority. A reasonable person would not be compelled to reach a different decision. The personal opinion of the administrative law judge, without more, is irrelevant.

Respondent thus satisfied its burden under Kinchen, supra, McPeak, supra and Van Sickle, supra.

### CONCLUSIONS OF LAW

- 1. Respondent's action was not arbitrary, capricious or contrary to rule or law.
- 2. The discipline imposed was within the range of available alternatives.

#### ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED	this	day of			
July.	2000. at		Robert W.	Thompson.	Jг.

Denver, Colorado.

Administrative Law Judge State Personnel Board 1120 Lincoln Street, #1420 Denver, CO 80203

# **NOTICE OF APPEAL RIGHTS**

### EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

### PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

## RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

### **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

## **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

## CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_ day of July, 2000, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Michael A. Montez 8485 Stacy Drive, #106 Federal Heights, CO 80221

and in the interagency mail, addressed as follows:

Joseph Q. Lynch Assistant Attorney General 1525 Sherman Street, 5th Floor Denver, CO 80203

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